

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 71/2010

In the review between:-

THE STATE

versus

XOLANI NTULINI

CORAM: KRUGER, J *et* VAN DER MERWE, J

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 25 FEBRUARY 2010

- [1] This is a special review emanating from the magistrate's court of Welkom. It arose in the manner set out below.
- [2] On 14 January 2008 the accused was convicted of dealing in cannabis in contravention of section 5(b) of Act 140 of 1992 and sentenced to a fine of R 4000,00 or ten months imprisonment as well as an additional twelve months imprisonment suspended for four years on condition that the accused is not convicted of contravention of section 4(b) or section 5(b) of Act 140 of 1992 committed during the period

of suspension. On 5 November 2009 the accused was convicted of possession of dagga in contravention of section 4(b) of Act 140 of 1992 and sentenced to twelve months imprisonment. This crime was committed on 10 June 2009. In the result, on 7 January 2010, the accused was brought before court in order to consider putting the suspended sentence of twelve months imprisonment imposed on 14 January 2008 into operation. The court then put into operation the suspended sentence but ordered that it is to run concurrently with the sentence of twelve months imprisonment imposed on 5 November 2009. The question that arises is whether the magistrate had the power to order that the sentence of 14 January 2008 run concurrently with another.

- [2] Section 280(1) and (2) of the Criminal Procedure Act, No. 51 of 1977 provide as follows:

“(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such

offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

- (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently."

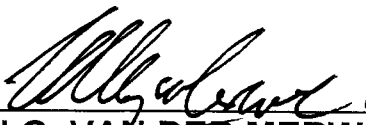
- [3] The "court" referred to in section 280(2) is "... the trial court passing sentence at the conclusion of the trial". Such court obviously only passes sentence in respect of the crime or crimes for which the accused was charged before it. The power to order that sentences run concurrently is in respect of a court of first instance therefore granted only to a trial court in passing its sentence at the end of the trial. That court is therefore empowered to direct that its sentence run concurrently with another sentence, including an earlier suspended sentence which is or may be brought into operation. It is however not empowered to order that the earlier suspended sentence run concurrently with its new sentence or any other sentence. For the same reason a court before which an accused is brought in order to consider the putting into operation of a suspended sentence after a

second sentence constituting the failure to comply with the condition of the suspended sentence had already been imposed, has no power to order concurrent running of sentences.

See: **S v STRYDOM** 1967 (2) SA 386 (N) at 387 C – F; **S v MOTHIBI** 1982 (4) SA 49 (NC) at 50 B – 51 C; **S v GOVENDER** 1986 (4) SA 972 (N) at 973 D – J; **S v BREYTENBACH** 1988 (4) SA 286 (T) at 292 F.

- [4] For these reasons it was not competent for the magistrate to order that the sentence of 14 January 2008 run concurrently with the subsequent sentence of 5 November 2009 or with any other sentence. There appears to be a good reason to consider further suspension of the suspended sentence in terms of section 297(7) of the Criminal Procedure Act. For these reasons the whole of the order of the magistrate of 7 January 2010 must be set aside and the matter be referred back to the magistrate for reconsideration of the request that the suspended sentence of 14 January 2008 be put into operation.

- [5] In the result the magistrate's order of 7 January 2010 is set aside *in toto* and the matter is referred back to the magistrate for reconsideration of the request that the suspended sentence of 14 January 2008 be put into operation.


C.H.G. VAN DER MERWE, J

I agree.


A. KRUGER, J

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